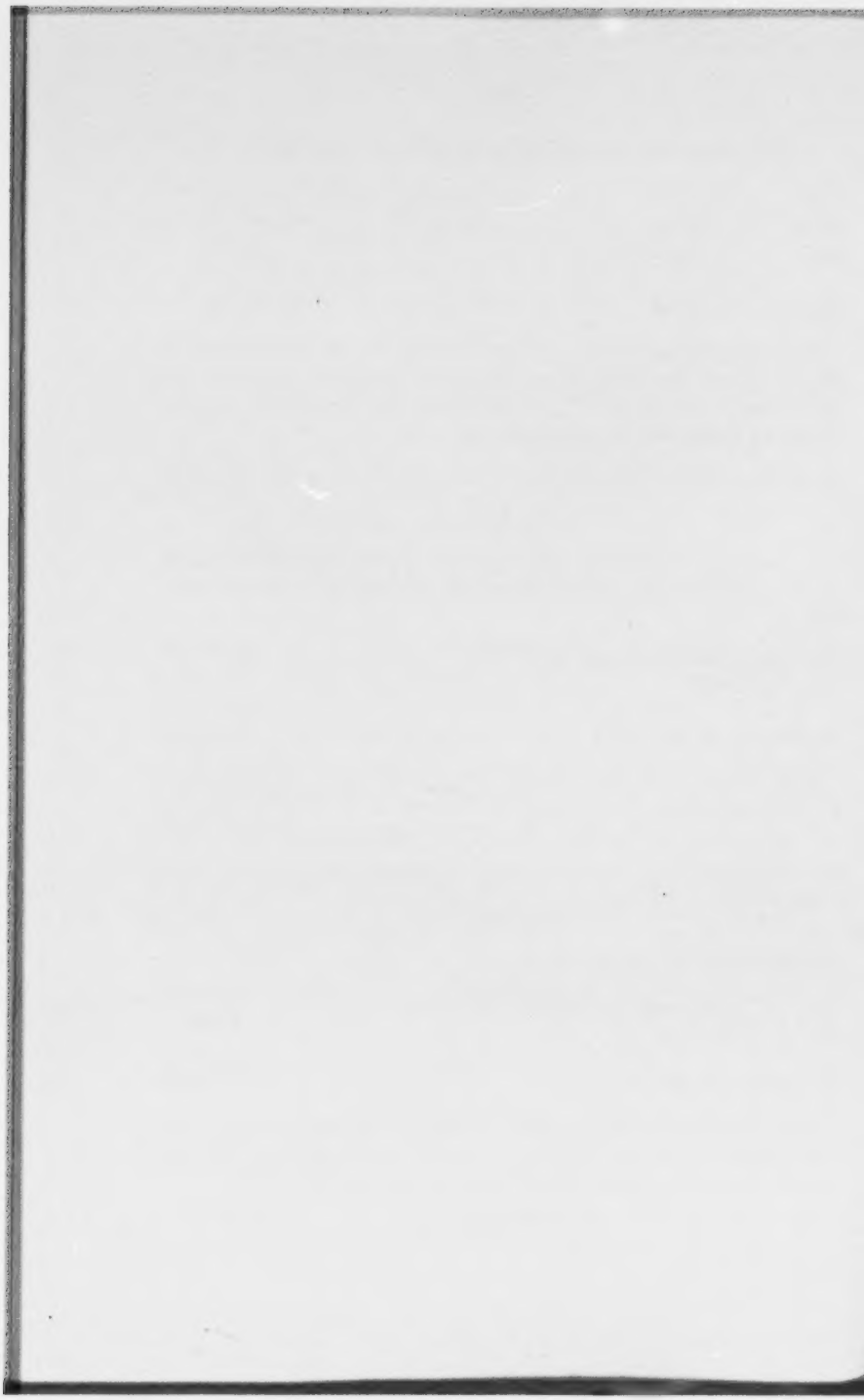

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 616

JUSTUS S. WARDELL, Receiver, District National Bank of Washington,

Petitioner,

v.

DISTRICT OF COLUMBIA,

Respondent.

Brief of Respondent in Opposition to the Petition for Writ of Certiorari

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CENTRAL DUPLICATING DIVISION—GOVERNMENT OF THE DISTRICT OF COLUMBIA

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SUMMARY OF ARGUMENT

1. The District of Columbia business privilege tax law was enacted only for the fiscal years ended June 30, 1938, and June 30, 1939, and expired on the latter date by specific limitation. Questions arising under laws which have expired or have been repealed are not of sufficient public importance to require the consideration of this Court.

2. The decision of the Court of Appeals is correct. All persons, including receivers, engaged in any business or commercial activity in the District were subject to the provisions of the District of Columbia business privilege tax law. During the tax years

here involved the petitioner was engaged in the business of operating apartment houses and an office building in the District of Columbia and is clearly liable for the tax measured upon receipts derived from such business.

The provisions of Section 570, Title 12, U.S.C.A., are not applicable to taxes due the District of Columbia. However, assuming that Section 570 does apply to District of Columbia taxes, it would not operate to abate the business privilege taxes here in question for two reasons: (a) it is the purpose of Section 570 to relieve the depositors and customers of an insolvent national bank of taxes which have been assessed or have accrued against the stockholders or owners of any such bank; nowhere is there indicated any intention to relieve the depositors or customers of taxes assessed or accrued against the receiver while he is engaging in business for the benefit and profit of such depositors; (b) payment of the business privilege taxes here involved would not diminish the assets of the insolvent District National Bank.

The decision of the Court of Appeals is not in conflict with any of its own decisions, or with any decision of any circuit court of appeals, or with any decision of this court.

ARGUMENT

I

The statute here involved has expired, and questions arising thereunder are not of sufficient public importance to require the consideration of this Court.

Title VI of the District of Columbia Revenue Act of 1937 imposed a business privilege tax for the fiscal year 1937-1938 (50 Stat. 690), Sec. 970, Title 20, D. C. Code, 1929, Supplement III. The act of May 16, 1938, to amend the District of Columbia Revenue Act of 1937, reenacted Title VI, and specifically provided in Section 16 thereof that the title should

expire June 30, 1939 (52 Stat. 369), Sec. 970o., Title 20, D. C. Code, 1929, Supplement V.

Questions arising under acts which have expired or have been repealed are not of sufficient public importance to require the consideration of this Court. *District of Columbia* v. *James J. Sweeney*, 310 U.S. 631.

II

The decision of the court below is correct.

(a) Petitioner was "engaging in business" in the District of Columbia within the meaning of the business privilege tax law.

No contention is made that the District National Bank was engaged in business during the periods here in question or that the receiver was engaged in the banking business. However, during the periods for which the business privilege tax law was applicable the receiver operated several apartment houses and an office building in the District, in connection with which operation heat, light, janitor, elevator, and other services were furnished. The rental of apartment houses and office buildings in connection with which such services are furnished is "business". *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 55 L. Ed. 389; *Von Baumbach* v. *Sargent Land Co.*, 242 U.S. 503, 61 L. Ed. 460. Thus, the business privilege tax for the fiscal year ended June 30, 1938, was measured upon only the rentals from apartments and office buildings in connection with which the receiver furnished such services. The renting of real estate and the renting of real and personal property is specifically designated as "business" by Section 1(e) of Title VI—Tax on Privilege of Doing Business—District of Columbia Revenue Act of 1937, as amended by the act approved May 16, 1938, 52 Stat. 363 (pet's. app. 38). Thus, the business privilege tax for the fiscal year ended June 30, 1939, was meas-

ured upon the receipts of the receiver from all rental of real estate.

The receiver is doing more than "merely liquidating the assets" of the insolvent District National Bank. He is engaging in the business of operating apartment houses and office buildings. Under the business privilege tax law, the operation of apartment houses and office buildings is "business", just as the operation of a grocery store or a gasoline service station is business. The petitioner, however, argues that because he is a receiver of an insolvent national bank he alone should be placed in a favored position and be permitted to engage in business in competition with other persons operating similar businesses without paying the taxes specifically imposed upon the operation of such business.

Although it is immaterial whether profit actually results [1], petitioner did derive a profit from the operation of the business during the taxable periods.

(b) The business privilege taxes here involved are not abated by Section 570, Title 12, U.S.C.A.

In the fifth defense in his answer to the amended complaint (R. 25), the petitioner alleges that any tax assessed against and collected from the District National Bank of Washington, or from the petitioner as receiver of such bank, will diminish the assets of said bank necessary for the full payment of all of the depositors of the said District National Bank, and contends that the business privilege taxes assessed against the petitioner are abated under the provisions of Section 570, Title 12, U. S. C. A. (pet's. app. 23).

Section 570 confers an exemption from national taxation only, and has no application to taxes collected by the District of Columbia [2]. The Treasury Department, in its letter of in-

[1] *Doggett* v. *Burnet*, 62 App. D.C. 103, 65 F. (2d) 191.
[2] *People* v. *Loughman* (CCA-2 1938), 100 F. (2d) 387, 389.

structions No. 4 to receivers of insolvent banks (revised to January 2, 1931), apparently considered the section applicable only to Federal taxes (see Appendix A). The language of the section clearly indicates an intention to make the provisions thereof applicable only to taxes assessed by the United States. The section applies only to taxes assessed or collected, or paid into the Treasury of the United States, and only the Commissioner of Internal Revenue is authorized to remit such taxes as are found to affect the claims of depositors of insolvent banks.

Petitioner's argument that the District of Columbia is a federal agency and that laws enacted for the District of Columbia are federal statutes reveals a lack of understanding of the relation between the two governments, and is directly opposed to decisions of this Court and of the United States Court of Appeals for the District of Columbia [3]. In the *Metropolitan Railroad* case [3] this Court rejected the argument that the Government of the District of Columbia is a department of the United States Government and held it to be a municipal corporation. In the *Maryland & Virginia Milk Producers'* case [3] the Court of Appeals held that Section 3224 R.S., which provides that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court," was intended to apply only to suits to restrain the assessment and collection of taxes levied by the United States, and was, therefore, inapplicable to District taxes. The Court of Appeals pointed out that District taxes are assessed by municipal authorities to defray the expenses of the District of Columbia and do not become a part of the general revenues of the United States.

However, even if Section 570 was applicable to taxes collected by the District of Columbia, and did relieve the depositors of payment of certain taxes assessed against the former

[3] *Metropolitan Railroad Co.* v. *District of Columbia*, 132 U.S. 1; *Maryland & Virginia Milk Producers' Assn.* v. *Hazen*, 66 App. D.C. 136, 85 F. (2d) 302.

owners of a bank, it does not follow that the receiver would be exempt from payment of taxes for privileges exercised for the benefit of the depositors themselves.

It is the purpose of Section 570 to relieve the depositors and customers of an insolvent national bank of taxes which have been assessed or have accrued against the stockholders or owners of the bank. This limited purpose is clearly stated in the two Court of Claims decisions construing the statute (*Johnston* v. *United States*, 17 C. Cls. 157; *Jackson* v. *United States*, 20 C. Cls. 298). In the *Jackson* case it is stated (p. 304):

> "It was clearly the intention of the statute to relieve the innocent customers of the bank, *between whom and the government there were no relations of tax-payer and tax-receiver*, and not to relieve the owners of the institution from their just liabilities." (Italics added.)

The business privilege taxes here involved are unlike the taxes considered in the two Court of Claims cases, *supra*, and by the United States Court of Appeals for the District of Columbia in the case of *Hazen* v. *Hardee* [4]. The taxes here in question did not accrue against the stockholders or owners of the District National Bank but are expenses incurred by the receiver while engaging in business for the benefit of the depositors.

It was clearly the intention of Section 570 to relieve depositors of national banks

> "from the payment of certain taxes, not assessed upon them, but upon the banks of which they are only customers; taxes which, under the pre-existing law, they would indirectly be obliged to pay when a bank is so insolvent that all its capital is gone and it

[4] 78 F. (2d) 230, 64 App. D.C. 346.

has nothing left with which to pay taxes, except the money of its depositors." *Johnston* v. *United States*, *supra*, wherein the court further said (p. 172), with respect to the purpose of the section:

> "These semi-annual taxes are assessed against national banks in their corporate capacity, upon their capital and business, in consideration of the franchise and benefits which the government grants to them, and for other reasons. They are expected to come out of the profits of the bank, and thus reducing the dividends of the stockholders, they are a tax upon the proprietors of the institutions. It was never intended thus to tax the customers and creditors of the banks. When, therefore, it was found that in case of insolvency of the bank and the loss of its entire capital, and its inability to pay its depositors in full from all its assets, an enforcement of the taxes would result in the taxation of the depositors, the customers and creditors of the bank, this act to relieve them was passed."

The language of Section 570, its legislative history and the interpretation placed upon the section by the Court of Claims clearly show that its purpose is to relieve the depositors of taxes not assessed upon them but upon the proprietors of the bank while it was operating as such. Nowhere does there appear any intention to relieve depositors of taxes which might legally be imposed upon the use of the assets for their own benefit.

In pargraph 4 of the second defense in his answer to the amended complaint (R. 23), petitioner admits that during the calendar year 1936 he received and derived a net profit from the operation of apartment houses and an office building in the District, which net profit was in excess of the business privilege taxes claimed and interest and penalties accrued

thereon, and in paragraph 7 of the second defense in his answer to the amended complaint (R. 24), he admits that during the calendar year 1937 he received and derived net profit from the rental of real estate and the operation of apartment houses and an office building, which net profit was in excess of the business privilege taxes claimed and interest and penalties accrued thereon. It therefore seems plain that payment of the business privilege taxes here involved will not diminish the assets of the District National Bank.

The business of operating apartment houses and office buildings and renting real property is conducted by the petitioner for the benefit of depositors of the District National Bank and business privilege taxes imposed thereon are merely an expense in connection with such business, and, while such taxes may diminish the profits derived from the business, they do not diminish the assets any more than any other expenses such as fuel, light, repairs, janitor, or other services in connection with the operation of a building. The argument that the receiver should be exempt from payment of the business privilege taxes here in question is no more sound or logical than the argument that expenses incurred on account of fuel, light, repairs, janitor, or other services furnished the apartment and office buildings operated by the receiver are not obligations of the receiver or the depositors, and should not be paid until after the depositors have received one hundred per cent of their claims. It cannot reasonably be contended that Congress intended to permit receivers of national banks to compete in business with other persons without being subject to similar taxes. Certainly no such discriminatory intention appears in the law.

Thus, assuming that Section 570 is applicable to the District of Columbia, it would not operate to abate the business privilege taxes here involved for the reason that such taxes are expenses of receivership and a liability of the depositors (as contrasted with debts of the stockholders), and payment

thereof will not diminish the assets of the District National Bank.

(c) Petitioner is not exempted from payment of the tax by the provisions of Section 6 of the business privilege tax act.

Petitioner points out that Section 6 of Title VI (pet's. app. 27), as originally enacted and as amended, exempts national banks which pay taxes under existing laws of the District upon gross earnings from the provisions of the title, and argues that such exemption necessarily applies to receivers of insolvent national banks engaging in separate and independent businesses.

The receiver is not a national bank, nor has he or the District National Bank paid any taxes to the District of Columbia upon any gross earnings for the years here in question. The provisions of Section 6 are applicable only to operating national banks, and the exemption applies only in cases where taxes on the gross earnings of such banks are paid to the District of Columbia under some other statute. No contention is made that the gross receipts here in question have been taxed, or are subject to tax, under any other existing law.

(d) The decision of the Court of Appeals is not in conflict with any of its own decisions or with any decision of any circuit court of appeals or with any decision of this Court.

As the fifth and sixth reasons relied on for allowance of the writ of certiorari, petitioner states that the Court of Appeals "has not given proper effect to applicable decisions of this Court" and that its decision "appears to be in conflict with its own decisions and with the decisions of other circuit courts of appeal". Petitioner's brief, however, fails to point out in what respect, if any, the decision of the Court of Appeals in the case at bar is in conflict with any other decision.

Apparently, the question of whether Section 570, Title 12, U. S. C. A., is limited in its operation to national taxation has been presented in only one other case [5] which was decided in 1938 by the Circuit Court of Appeals for the Second Circuit, and which decision is in accord with the decision in the instant case. Respondent has found no decision in conflict with that of the Court of Appeals in the cause at bar.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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[5] *People* v. *Loughman*, 100 F. (2d) 387, 389.